



June 27, 2001

Mr. William T. Buida
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-2774

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148808.

The Texas Department of Human Services (the "department") received a request for "any and all documents, notes, correspondence, summaries, worksheets, memoranda, and/or assignment sheets reviewed, produced, generated, used, and/or compiled for or during the informal dispute resolution process," and "any and all documents, correspondence, notes, memoranda, summaries, statistical analysis or other compilation of information used or designed for use during the IDR process" related to several service providers. You state that you have provided us with representative samples of the requested information.¹ You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with several state and federal statutes. We have considered your claims and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that the survey investigative reports

¹ We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

and their attachments are made confidential by section 242.127 of the Health and Safety Code. That section provides that “[a] report, record, or other working paper used or developed in an investigation under [subchapter E, chapter 242] is confidential and may be disclosed only for purposes consistent with rules adopted by the Texas Board of Human Services or the “designated agency.” See Health & Safety Code § 242.126 (investigation of complaint of abuse or neglect by Department of Human Services or designated agency). We therefore find that the survey investigative reports and their attachments are made confidential by section 242.127 of the Health and Safety Code.

Federal and state statutes also prohibit the disclosure of information concerning clients of a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. See 42 U.S.C. § 1396a(a)(7); Hum. Res. Code §§ 12.003, 21.012; Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 of the Human Resources Code provides in relevant part:

(a) Except for purposes directly connected with the administration of the department’s assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a)(emphasis added). In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the department’s clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” *Id.* at 3.² Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. See also Hum. Res. Code § 21.012 (a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs). You represent that “many residents in the nursing facilities listed are Medicaid recipients.” We have no indication that the department has determined that the release of the

²In Open Records Decision No. 584 (1991), this office construed section 602(a)(9) of title 42 of the United States Code, relating to state plans for aid and services to needy families with children. See ORD 584 at 1-2. Section 1396a of title 42, United States Code, provides in relevant part that “[a] state plan for medical assistance must . . . provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan[.]” 42 U.S.C. § 1396a(a)(7). Thus, the determinative language of section 1396a corresponds to that of section 602(a)(9), as interpreted in Open Records Decision No. 584.

requested information in this case would be for a purpose directly connected with the administration of the Medicaid program. Thus, based on your representations, the department must withhold from the requestor any information concerning Medicaid recipients pursuant to section 552.101 in conjunction with the above-stated provisions of federal and state law. We have marked the documents accordingly.

You also assert that some of the submitted information is confidential under the Medical Practice Act (the "MPA"). Access to medical records is governed by the MPA, subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

You also assert that some of the information is confidential under section 102.003(j) of the Human Resources Code. Section 102.003(j) provides:

...

(j) An elderly individual is entitled to access to the individual's personal and clinical records. These records are confidential and may not be released without the elderly individual's consent, except the records may be released:

(1) to another person providing services at the time the elderly individual is transferred; or

(2) if the release is required by another law[.]

...

We agree that this information is confidential and we have marked the documents accordingly.

You also assert that the Informal Dispute Resolution ("IDR") worksheets and review notes are made confidential by section 242.049 of the Health and Safety Code. Section 242.049 provides in pertinent part:

- (a) The department may evaluate data for quality of care in nursing homes.
- (b) The department may gather data on a form or forms to be provided by the department to improve the quality of care in nursing homes and may provide information to nursing homes which will allow them to improve and maintain the quality of care which they provide. Data referred to in this section can include information compiled from documents otherwise available under Chapter 552, Government Code, including but not limited to individual survey reports and investigation reports.
- (c) All licensed nursing homes in the state may be required to submit information designated by the department as necessary to improve the quality of care in nursing homes.
- (d) The collection, compilation, and analysis of the information and any reports produced from these sources shall be done in a manner that protects the privacy of any individual about whom information is given and is explicitly confidential. The department shall protect and maintain the confidentiality of the information. The information received by the department, any information compiled as a result of review of internal agency documents, and any reports, compilations, and analyses produced from these sources shall not be available for public inspection or disclosure, nor are these sources public records within the meaning of Chapter 552, Government Code. The information and any compilations, reports, or analyses produced from the information shall not be subject to discovery, subpoena, or other means of legal compulsion for release to any person or entity except as provided in this section and shall not be admissible in any civil, administrative, or criminal proceeding. This privilege shall be recognized by Rules 501 and 502 of the Texas Rules of Civil Evidence and the Texas Rules of Criminal Evidence.
- (e) The information and reports, compilations, and analyses developed by the department for quality improvement shall be used only for the evaluation and improvement of quality care in nursing homes. No department proceeding or record shall be subject to discovery, subpoena, or other means of legal compulsion for release to any person or entity, and shall not be admissible in any civil, administrative, or criminal proceeding. This privilege shall be recognized by Rules 501 and 502 of the Texas Rules of Civil Evidence and the Texas Rules of Criminal Evidence.

(f) Notwithstanding Subsection (d), the department shall transmit reports, compilations, and analyses of the information provided by a nursing home to that nursing home, and such disclosure shall not be violative of this section nor shall it constitute a waiver of confidentiality.

Health and Safety Code § 242.049(a)-(f). Section 488.331 of title 42 of the Code of Federal Regulations provides a process by which a facility may refute survey findings. The documents for which you bring your section 242.049 claim were, you inform us, generated by the department during that process. You argue that:

The worksheets are used by the department to provide quality assurance and quality maintenance for the department's surveyors and management. The worksheets were intended only for internal use by the department for quality assurance and ultimate quality improvement in nursing homes. The worksheets must be maintained as confidential to allow open feedback to the surveyors and used as training tools for the surveyors. The worksheets are prepared from information that was received by the department and from internal agency documents, reports and analyses. The worksheets are clearly analysis developed for quality improvement.

Upon review of your arguments, we find that the department has not shown that documents relating to the IDR process are "quality improvement records" made confidential by section 242.049.

In summary, based on section 552.101, the department must withhold from disclosure 1) the survey investigative reports and their attachments in the submitted documents that are made confidential by section 242.127 of the Health and Safety Code; 2) personal and clinical information that is made confidential by section 102.003(j) of the Human Resources Code; and 3) information concerning Medicaid recipients that is made confidential under sections 12.003 and 21.012 of the Human Resources Code. Medical records may be released only as provided by the MPA. The department must release all of the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

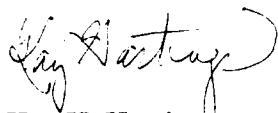
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/DKB/seg

Ref: ID# 148808

Enc. Submitted documents

c: Ms. Claire Langford
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(w/o enclosures)